

This transcript includes edited remarks by three experts in the area of right-of-ways and easement practices. This transcript package includes panelist edited remarks along with questions and answers and a three handouts:

- Federal Lands Telecommunications Right-of-Way Law (Public Law 98-300, May 25, 1994)
- Bureau of Indian Affairs ROW Guideline Overview (Part 169.25.CFR)
- Center for Applied Research, "Negotiating Telecommunications Easements on Tribal Lands"

Panelist biographies and addresses are included at the back of this transcript. The panelists are presented in order of their remarks:

- **Raymond Etcitty**, Attorney, Navajo Nation
- **Parker Sando**, Realty Specialist, Bureau of Indian Affairs (BIA)
- **Steve Campbell**, the Center for Applied Research

MR. ETCITY: I work as an attorney for the Navajo Nation's natural resource unit. Right now I sort of feel intimidated because Scott Taylor, my law professor is sitting in the back. I'm wondering whether he will critique me and give a grade on this presentation. I don't think I can quote many of the cases or specifics from memory like him.

I will give a general introduction to rights-of-ways through Indian lands. After that Parker Sando will talk about the BIA process. Mr. Campbell, who works for the Center for Applied Research, will talk about the right of way negotiations.

If your company or your clients wants a of right-of-way through a reservation, a Pueblo, or any other land, you must understand property law.

The Navajo Nation has almost every type of land status within its boundaries. A rights-of-way is essentially a type of easement. A majority of reservation lands, specifically trust land, is held by the Federal government in trust for the Tribe. The federal trustee role developed many years ago through a Federal interest to sort of look after Tribes. The Tribe, however, is the land owner for trust land and the government of jurisdiction..

Thus, whenever you obtain a right-of-way, this trust relationship requires one to go both to the Tribe as well as the Federal government. The right of way language covers the concerns of a Tribe as a land owner and other jurisdictional issues. Federal interests are managed under law and regulations by the (BIA).

You can obtain right-of-way information from either the Tribe or the BIA about procedures and application requirements.

You may also encounter right of way requirements such as environmental assessments and cultural and archaeological clearances. A majority of these requirements are Federal and not tribal. These requirements, of course, come from the National Environmental Policy Act, and the Cultural Resource

Protection Act, and the Endangered Species Act. Right of way requirements include a basic survey, an environmental assessment, cultural clearance, and consideration offered for the right of way itself.

Besides Federal requirements, you will need to know the Tribe's own internal procedures/regulations. Among tribes these requirements vary. A major difference between trust land and non-trust land is that it not held inn fee title. Your right of way easement will not change the nature of the land or the land's status. It simply gives right or access through the land for a specific reason(s), but no property interest.

MR. SANDO: Good afternoon. I'm Parker Sando. I'm with the Albuquerque BIA Area Office where I have been a realty specialist for 18 years. Ray referred to Scott Taylor; Scott and I were classmates in law school 20 years ago.

If you are familiar with Indian law, you will see that right of way practices were put together in a piecemeal approach. At the turn of the century, Congress realized Tribes were going to be around, so it provided for specific rights-of-way law authorizing telegraph, telephone, gas lines, roads, highways were passed. Then in 1948, Congress passed a general Act authorizing rights-of-way of all types. Since federal trust land is managed by the Secretary of Interior, the BIA was delegated authority to grant the right-of-way and sign-off as the land owner held in trust for the Tribe. Sign-off, however is not done with consent of the tribe as the beneficial owner.

When I was first started to work for the BIA, some companies tried to bypass the requirement for Tribal consent because the 1948 Act says the federal government grants the right-of-way without mentioning tribes.

The right of way regulations in 25 CFR part 169; however, requires consent of the land owner, either the Tribe or an allottee [individual with conferred land rights] The BIA Albuquerque Area Office covers New Mexico and Colorado, a bit of Texas, except for the Navajo Tribe. In this area less than 2 percent of the land base is held in allotments. So we're dealing mostly with Tribal lands, which requires Tribal consent to grant the right-of-way. The owner's consent is required for allotted lands. In limited circumstances, the superintendent can sign them on their behalf. This occurs when the request involves a minor, the inability to locate the owner or when too many people have ownership rights.

BIA right of way practices may vary because we try to be flexible. You may start off with an application to survey a specific line or apply for a right of way if you know the exact line location. If you do not know the location, a check to cover estimated damages or a surety bond is required. Under regulation 169.5, a written application giving the specific right-of-way use is required.

The BIA like everybody else has problems when a highway right-of-way turns into a utility corridor. To avoid further problems, you should ask the applicant specifically about the right-of-way use. If it's for a highway, that's the only purpose. If other uses are planned, another right of-way application is required.

The guidelines stipulate certain practices on processing right-of-way and for certain circumstances such as cutting shrubs and trees. You can't just destroy. Lumber needs to be cut, stacked and placed for tribal use.

The BIA requires maps showing definite location showing where the right-of-way is going to be. Copies are provided to the tribe along with a narrative description of the right-of-way. The maps and descriptions are fairly simple cut-and-dried things, however, we typically find errors like the wrong township or range listed.

The BIA requires a deposit with the application or with the estimated consideration in damages for destruction of the property, fences, roads.

The 1969 National Environmental Policy Act was applied to Tribes and the BIA through federal case law from New Mexico. Generally, it's quicker for the applicant to do the environmental assessment, especially if it's a really major project.

Once the application has been submitted to the Tribe, we get a consideration under 169.12, the consideration shall be not less than, but not limited to the fair market value of the right-of-way granted, plus severance damages.

BIA staff can conduct an appraisal.. It's quicker for the applicant to hire their own appraiser. The appraisal establishes the beginning point for negotiations. The Center for Applied Research offers negotiation services. . The Tribes are wanting more and more compensation for the use of their land, which is only fair.

You may need to pay for incidental damages such as relocation of power lines, telephone lines and irrigation ditches. This is especially true, if you are relocating a highway.

After the BIA has reviewed all relevant documents submitted by the applicant, it will approve it if the tribe has consents. The Secretary signs and grants an easement document granting the right-of-way, and it's filed in our land titles and records office, and usually the applicant will file it with the County.

Under 1948 Act, most rights-of-way access roads and utilities can be in perpetuity. But for the most part, Tribes no longer want to grant rights-of-way in perpetuity.

After a right-of-way is constructed, an affidavit of completion is filed. The application is amended if a problem occurs such as identification of a cultural site is discovered during construction. You might have to relocate and or go back to the Tribe additional consideration.

So from the Bureau point of view, I think it's fairly cut and dried. It's you apply for the right-of-way, go through all these steps, and if everyone is in agreement, the right-of-way is granted, as opposed to mineral leases or surface leases, where it can be an ongoing fight with the lessee.

Over the last 20 years, the contentious part has been the consideration, which is what Mr. Campbell is going to be talking about.

Fiber optics has become a big topic. One company wanted to use the Santa Fe Railroad right-of-way, and offered each Tribe \$25,000. That was their standard practice. The Center for Applied Research got involved and ended-up with a million dollar check. So there's a big difference in what can be

negotiated. Because you cannot condemn Tribal land. If they don't want to pay it, they're told to go around us. For some Rio Grande Corridor Tribes, it's hard to go around them, especially a Tribe like Isleta, which goes east and west many miles, from the Rio Puerco to the Manzano Mountains.

Or if they're trying to use a railroad right-of-way, that's where the tracks are. They're not going to get the railroad to relocate the right-of-way. That's where it is. If you want it, you got to pay for it. So with that,

MR. CAMPBELL: As Parker said, I'm with the Center for Applied Research which is based in Denver and Albuquerque. We create the envelope for negotiations.

Easements for rights-of-way. An easement for a right-of-way is for a non-possessory interest in land. It's a right to use land, not a right to possess and own land. It allows a non-owner to use land for a specific purpose, and that's something that's very critical.

Parker just mentioned, if a road right-of-way comes through a reservation, you need to be very careful that that right-of-way is for that purpose and no other purpose. It has to be specific to the right-of-way, or the easement.

Typically, it gives the holder the right of access, across the reservation, through this narrow corridor of land, which is typically anywhere from five feet wide, up to maybe 200-300 feet wide.

Examples of rights-of-way. Right of ways started as paths across other people's land under English common law. If you own a piece of land, another land owner owns a piece of land, and you have to get across that land, you get that right to go across it, and that's your right-of-way. That's evolved into roads, it's evolved into railroads, and now it's evolved into transportation of product, or transportation of things of economic value. That's what we're talking about today, those things of economic value.

he two prior speakers mentioned what the Right-of-Way Act of '48 provides. There's three critical components: 1) the Secretary of Interior grants the easement for the right-of-way; 2) compensation or not less than fair market value plus severance damages; and 3) tribal consent.

The land men for energy companies, natural resource companies, are used to dealing with rights-of-way and easements across private land, in which case they can go and condemn the land. They can say, what is the fair market value? We got an appraiser's report. We tell you, this is what fair market value is.

If you disagree with that, you go out and get another appraiser to say it's a different value. On the reservation, the Tribe has the ultimate authority to accept or totally reject the right-of-way.

UNIDENTIFIED ATTENDEE: We got a unique situation in the state of Oklahoma involving the state court over an individual allotted land. That part was traded to us. The State wants to come in and get a right-of-way. There's about four or five situations right now, and relative to this, they're building across one of our reservations, and so, what they're doing is they're taking us to court. Tribes nationwide watching what outcome this will be. I'm curious about is the silence of the BIA.

MR. CAMPBELL: That's a real problem. We are presenting this topic today as though it were maybe a little more simple than it actually is. However, Congress and the Courts have taken a variety of actions over the past 200 years which complicates things. For example, the Pueblo Lands Act allowed entry into Pueblo lands to tax Pueblo land and hold the land as a lien for nonpayment.

So there are a lot of situations like that. I don't want to get into a whole lot of detail about specifics at this point, but I think when we get into the discussion, there are a lot of cases where -- there's an escheat in your case, that you're talking about. In cases where, for a variety of reasons, the land has been alienated by some form or another. But what I'm talking about now is strictly reservation trust lands.

UNIDENTIFIED ATTENDEE: Well, in our reservation trust lands, one of the counties came to us and they told us we owed them thousands of dollars for money we haven't paid for years. They didn't understand what trust property was.

In non-Indian, non-Tribal trust land, a private company or government can condemn the land for public use. They go through a legal and judicial process. Ultimately, the consent of the land owner is not as critical to that discussion. On trust lands, on Indian lands, on reservation lands, they can't do that. They have to come to the Tribe to get consent.

But that raises the next question, Parker described as the minimum price to start negotiations. or The minimum floor is fair market value for the land, for the right-of-way across the land, and any severance damages that result.

But what's the limit? What's the upper limit? That's what we talk about. That's our primary work - to determine what is that envelope. How should a Tribe go about looking at alternative forms of consideration, and ultimately its bargaining structure.

The Center for Applied Research uses three approaches to determine the envelope: 1) traditional appraisal, which is fair market value for the right-of-way to cross land; 2) the net income approach. -- what the company is expecting to make by going across your land.; and 3) strategic advantage -- what would it take to go around your land? That's, in a very crude sort of sense, that's what we're trying to say.

Net income approach: The Center has been very happy with this approach. We start with total profit of the enterprise, let say for example the profit value of long distance revenue and then compare the economic value of the fiber optic line. The next step is to determine the portion of the line's profits to the reservation line length. If you have 2000 mile line across the country, but only 20 miles across a reservation, then simple arithmetic says 20 over 2000 equals 1 percent of the total.

UNIDENTIFIED ATTENDEE: Is that applied to both trust and non-trust land?

MR. CAMPBELL: Well, that varies from place to place. In quite a few reservations the question is, do we treat just the trust lands, or do include in-holding non-trust lands held by members in fee, for example, or the land held by non-members in fee. And that varies.

Though it varies, my answer to that is as a sort of beginning rule, we use the value going across the reservation. So, if that's 20 miles, of which five miles goes across non-trust land, we would start with that, as that 20 miles as the relevant piece, and let the company come back and argue that they're serving maybe people within the reservation who are non-members, or that a lot of the income derives from that piece that's not across trust land, and so forth.

MR. CAMPBELL: The final step is to determine how much of the company's profit is related to the fiber optic line going across the reservation. Then you ask what is the reasonable sharing of the profit between the company and the Tribe? Generally, we start with a 50/50 split. We say 50 percent goes to the company for all of its risk, for its investment of capital, and so forth. 50 percent goes to the Tribe. And in a way, it's almost a biblical thing. You cut the baby in half and say half goes to each. So those are the main components of a net income approach.

Now, we have two pieces of this envelope puzzle -- fair market value from a traditional appraisal approach and the net-income-based value of the enterprise. The final piece is the strategic advantage that the Tribe brings to the table? This can be very site-specific, Tribe-specific issue.

One factor is the location of the land. Another factor is the location of the company's market? Are you between a major point of production and a major point of sale? If you are, then you're in a strategically advantageous position.

What are the environmental considerations, both on the reservation and off the reservation? If you're -- if the reservation offers a way around, for example, the Manzano mountains, then you offer a competitive advantage, vis-a-vis a route that would have to go through the mountains.

Again, what are the physical constraints? Is a highway right of way so narrow in a certain point that fiber optic line needs to be placed elsewhere?

There could be an institutional advantage. A company that wants to deal with Native Americans. And that exists, and we've dealt with companies with that interest.

UNIDENTIFIED ATTENDEE: If a Tribe wants to purchase telephone lines along with existing right-of-ways, will this approach also be used against the Tribes, to fix the price of those right-of-ways?

MR. CAMPBELL: My quick answer to that is that those are two separate issues. In one case, you have, under the pre-deregulation world, companies that were required to serve areas, and still do, in fact, have companies that are required to provide service to residences and businesses within an area.

We treat that as separate from the right of a company to use a reservation as a corridor to go from one market to another market.

I think the service on the reservation should be as good as it is anywhere else in the country. On the other hand, the reservation might offer some strategic advantages, or some reason why the company wants to go through that reservation, that are independent of their wanting to serve that market.

UNIDENTIFIED ATTENDEE: If a Tribe on trust land wants to establish their own utility or telecommunication lines, are they going to have to apply to the Bureau for rights-of-way? That's one question. The other question is, if those rights-of-way are already established, will they have to purchase them from the existing company that now holds those rights-of-way?

MR. ETCITY: In order for a person, or any entity, to do anything upon Tribal land, it must have permission from the Tribe and the BIA. That permission is evident in the form of a permit, a lease, or a right-of-way. That is your permission to do something. So, right-of-way is your easement. So, if an entity wants to come upon a reservation, it must obtain permission and right-of-way, because the Tribe is the land owner.

The tribe has its own internal process for things like building roads. It will somewhat comply with the environmental laws and give information to the BIA on the location of these, but it does not give itself its own easement, because it owns the land.

MR. CAMPBELL: On the second question, let me rephrase it and ask you if this is what you're asking: If a Tribe wants to establish a Tribal utility and that utility includes, for example, telecommunications, both local telecommunications and long distance telecommunications, does the Tribe have to compensate the holder of the easement whose lines those belong to?

If that's the question, I think the answer is usually yes, unless there's an agreement otherwise. But I'd say in most cases, yes. The Tribe will have to either negotiate, or in some cases, maybe condemn that property, as a Tribal activity.

Now, that opens a whole can of worms that I'm really not prepared to talk about at this point, and I see people smiling here about condemnation and the like. It's not something that you want to enter into lightly, and it's certainly isn't something that you want to enter into without getting very good legal advice.

UNIDENTIFIED ATTENDEE: If you're going across non-trust land, they can condemn it, right? If you offer to put in your own fiber optic line across Tribal land that's not trust land, and if you put in your own lines, can they still condemn it and take the easement, since --

MR. CAMPBELL: If a company wants to put a line into a non-trust portion of the reservation, and they can, therefore, condemn that non-trust portion of the reservation, what happens on the reservation side? Is that?

UNIDENTIFIED ATTENDEE: Well, if I'm going to go ahead and put in my own line, can they still condemn it, or do they have to use the line that you put in, so that you lease back the line to them?

MR. CAMPBELL: I'd say in most cases, if you're condemning an asset that's being used both by a Tribal and non-Tribal purpose, in general, the Tribe probably will pay compensation to the non-Tribal use that's being contemplated.

MR. SANDO: I was just going to comment on a question. If you have an existing right-of-way to an utility company, they can assign it to the Tribe, if they want. So it's no problem assigning the right-of-way, the existing right-of-way. The BIA has often built roads and turned them over to the County for maintenance. There's no problem assigning them. The Tribe can build their own utilities. They don't need rights-of-way. It's their own land.

If a highways is federally funded, the State wants you to have a right-of-way, you have to. But we always encourage Tribes to put in for apply for grants of easement, although it can be a pain to go through. Water lines, sewer lines, telephone lines, gas lines, they're dangerous to rip. So it's good to know where they are, not just to stick them in the ground and forget about it.

MR. CAMPBELL: I want to mention a couple of things unique to telecommunications' easement and right-of-way consideration, that affect the negotiating environment.

First, you're dealing with what we call production to sale links. In other words, if you have a refinery and you have a market, and you have a pipeline going from the refinery to the market, that's clearly a production to market, or production to sale linkage. And you can pretty well determine what's the value at one end, what's the value at the other end. The difference is, the increase in value is what's at play here.

In the case of a telecommunications, it's a network. It's all interconnected. In some cases the company will say well, this part of a line has less value, than one going through New York City, so we shouldn't have to pay the same amount for any piece of that line.

That might be true, but in other cases you might think, that the overall network has a value in itself. The value of a network that excludes a large part of rural America is far less than one that includes a large part of rural America. So, that's one of the considerations.

The history of the telecommunications is a story of using new technological solutions for a communication problem. The country legacy systems like microwave and copper/

You're talking about two major products that are changing -- a voice product that's largely analog, and a largely digital data product. Most everything, I guess, is moving towards digital products, so that distinction might become less important over time.

What might become more important are these last two items, the emerging markets and the emerging technologies. Those two are very connected and include such things as video conferencing, telemedicine, and interactive video. Those kinds of things are very important to considering what the future markets are for this value that's going through this asset that's going through the reservation.

And in a nutshell, these are the negotiation issues that you need to consider as a Tribe: The first is, what is the appropriate value? Is it fair market value, as appraised? Do you have strategic assets that you can bring to the table? What is the net income? Which of those should have more weight than the other.

The second is, what is the company's ability to pay? In some cases you'll be dealing with start-up companies that want to come in and maybe become a partner with the Tribe. And that's great if you can establish these values up front, and not just take the company or the entrepreneur's word about what the value to the Tribe is.

You should have an independent understanding about value to the Tribe? What is the actual value of this product, or these assets? And in that respect, you have monetary and non-monetary compensation.

And just for a second, I'd like to touch on a couple of items on non-monetary compensation.

The routing of the line can have an effect. I'm talking now about mainly about fiber optic lines. Where it's routed through the reservation could have enormous effect on the reservation, or it could have very little effect on the reservation, on the Tribe. You need to determine that up front.

The connections to that line, there could be some negotiation for connections to the -- to the fiber optic network. Donations of equipment, donations of technical assistance, and so forth.

Again, you need to value those items yourself. Don't accept the value that the company tells you and historical price for the investment. If somebody comes to me and said here is a computer -- worth \$50 million. Well, to me it's worth nothing, because I can't run it, and I don't know how to use it. I don't know what the market is for it. 10-20 years later, it's worth \$50.

So you got to keep in mind that the company's going to come to you and talk about value. You need to have your own independent assessment, understanding about what that value is.

UNIDENTIFIED ATTENDEE: I want to thank you for a real good presentation. I think these are issues that are a concern to all Tribes on rights-of-ways, especial the Rosebud Sioux Tribe. Piggybacking occurs there where the electrical cooperatives assessing a fee for the phone company and the cable companies, to use their right of way without coming to the Tribes, or providing additional compensation. Tribes, they ought to take exception to piggybacking, or is it an issue?

MR. ETCITY: The ability to piggyback depends on how the right-of-way is made and what it refers to. Sometimes, right-of-ways are done for a specific purpose. So if you want a power line, I don't think power line contemplates telephone lines or all the other lines. Other times the wording might be utilities. A Tribe internally has to determine what the policy is. It would be nice if Tribes would pass internal rules and regulations defining that; that when it consents, you do have a limitation on what you're consent means.

MR. SANDO: In the past, Tribes gave give general rights-of-ways. They would use general language, and they would do it in perpetuity. This partially comes down to changing use, like fiber optics could be granted on a railroad right-of-way. 100 years ago, who knew fiber optics was going to develop? But by the same token, back then it was just granted a general right-of-way, and you leave it up to people to argue what it means.

Right of Way & Easement Practices

5-10

In 1980, a gas company in New Mexico didn't want to apply for separate rights-of-way in the highway rights-of-way. It got kicked up to the BIA Washington solicitor's office, and the head solicitor was an attorney who worked for a utility company.

So guess how he rules? No, you don't need to get a separate right-of-way. He interpreted Federal laws if you granted a general right-of-way, there was no limitation. It was open to become a utility corridor, so we were stuck with it.

After that ruling and we received instructions they stated for this purpose only, nothing else, and limit the damage. But following the old existing rights-of-way, we were stuck with it. If a highway right-of-way was granted, according to that language, they could turn it into a utility corridor, or used to.

Within the last two weeks, we received something from our solicitors. In State of New Mexico, they changed their policies, that they cannot just turn a right-of-way into a utility corridor without the owner's permission.

So, it wasn't so much a change in our side. It was a change on their side. Do we need the owner's consent? Well, we're going to have to go back to the Tribes. And we're still not certain to what extent it's going to open up a can of worms.

Do we just need the Tribe's consent, or does consent entail applying for a whole separate grant of easement. It was a big problem, but slowly it's closing up, at least in the State of New Mexico.

They were turning the rights-of-way into utility corridors. Once relocate old highways. If you have utilities piggybacking, what happens to those? They're stuck there. The original right-of-way is for a highway, but the highway is no longer there, and the utilities are piggybacking and still stuck in the land. So over time, I guess these problems are popping up, and they're being resolved slowly.

MR. SANDO: In the Albuquerque Area, a lot of the utilities don't know what Indian land is, because it shows up on many maps at Federal land. The BLM had given permission for all BLM lands, and they assumed all Indian land was BLM.

And they started moving in their fiber optics, till the Tribes said, hey, what's going on. And it's a long distance to go. And they had to get stopped. And they just thought, well, BLM land, Indian land, we have permission. And no, they didn't. We have a case now, where a company has a big gap in the middle of its network. They will have to sit down and write out big check.

UNIDENTIFIED ATTENDEE: Can a company sell or lease extra fiber capacity to other companies?

MR. SANDO: Well, it just depends on the agreement of structure. If they just have a general granted easement, you should find out how many lines they are putting per conduit. And yes, if they plan to sell or lease that should be addressed up front. If you don't know what the industry is all about and what they're planning to do, you can get the short end of the stick, I guess.

UNIDENTIFIED ATTENDEE: I would think it would be very hard to put a price tag on fiber because the capacity is unlimited, depending on the type of equipment that you have.

MR. SANDO: The technology keeps expanding all the time.

MR. ETCITY: The Navajo Nation has stipulations granting the right-of-way. So, in the resolutions that approve it, the Navajo Nation does stipulate that, you know, it is to be done for a certain purpose. If it's to be done for another purpose, then you have to come back to the Tribe for more compensation.

The Navajo Nation is large and has many fiber optic lines for both commercial and non-commercial purposes. We do have schools and regular individuals that want services, utilities, and we usually put in some type of stipulation gain service.

I think someone made the point that it's nice to also have terms, and it expires at a certain time, so you can always negotiate later. Companies though do know that it's advantageous for them to make sure that it's general language and to make sure that it's perpetual, for Tribes. Just try to watch yourself.

MR. SANDO: Just make certain right-of-ways for a certain term. Ten years, 20 years, and if things change drastically, then you can renegotiate and find out their current capacity and income.

MR. GARCIA: I just want to make a point that phone companies argue that the right-of-way includes improvements. If they have copper, then will want to lay fiber optics. Fiber optics shouldn't be considered just an improvement, because what it does is it allows for that expandability. A Tribe needs to be clear from the beginning, and specifically that it includes copper.

MR. CAMPBELL: You need to be sensitive that almost every company which operates an economic enterprise in a right-of-way, an easement, is going to need to track the condition of right of way equipment back to their home office operation,

In a lot of cases, you're going to see things like an electric line that has a telecommunications component to that electric line, and that company wants information about the condition of that line back at the company. So it's very important, in those rights-of-way, to say that that telecommunications is for internal purposes only, and I think that's something that people, I think, need to be very sensitive about.

MR. ETCITY: One thing that you must remember is that although we're talking rights-of-ways, there are also other property interests that a person can use to obtain items on the reservation. We're talking rights-of-ways for lines, but in addition to this, if you're wanting to -- you know, a microwave tower, do you want a telecommunication site?

You can also obtain a revokable lease permit for microwave towers. The general laws that apply to rights-of-ways are pretty much generally applicable to leases and permits. Again, comply with your Environmental Protection Act, your -- you must do your EEAs, your clearances, and negotiate with Tribes.

MS. YAWAKIE: Just a comment. You talked about non-monetary compensation, can tribes negotiate jobs.

MR. CAMPBELL: The point was that the concept of jobs needs to be considered in right-of-way negotiations. Most companies are going to be fairly open to that. Once you get past the land men, the guys that are used to condemning land, and start dealing with the operations people.

MR. ETCITY: On the Navajo Nation, you have individual members who reside upon trust land, but have cultural customary use. Although the title is held by the tribe, internally you may encounter individuals who are on the piece of land which want compensation too. So, you may need to compensate prior land users.

MR. SANDO: One point I want to make, especially with telecommunications. At the turn of the Century, people were granting one easement for a telegraph line. Then they added another and another as the population expanded. Soon you had a spider web, lines going all over the place. Maybe 20, 30 different granting of easement. When they want to upgrade a line, it is a problem. Some Tribes tell them if you to upgrade all lines. Do one master plan of easement. We're tired of having 120 different rights-of-way, with 20 different terms.

Give us one big right-of-way covering every one you have, so everything is nice and tidy, and we have the right terms, compensation, the uses. You know, make them come in and do one nice clean package to start off with.

MR. WILLIAMS: Just one comment from a Tribal telephone company that provides service on the reservation. I think there has to be a proper balance between the Tribe and telephone company. I've seen Tribes, particular our Tribe, that as they become more knowledgeable, particularly in the environmental aspects of right-of-ways, they become over zealous.

This puts a bigger demand on the utility company to accommodate. For example, we crossed a BIA road with a road bore. It was previously disturbed. We thought it was okay. The Tribal archaeological office sent out a person for a site visit. He finds the top of a potbellied stove that to me was reservation trash with some age to it. However, it had 1910 on it and fell out of a wagon. He declares it an arc site. According to the rules as I understand them, it is permanent decision and we cannot put a cable, within a mile of that arc site. At this point we have to accommodate that mile to divert our line around.

While we are quickly adapting our rules to facilitate this new-found practice of the Tribal preservation office. The customers will bear that cost of doing business on the reservation.

MR. ETCITY: Well, that's pretty much what happens on the Navajo reservation. We do have a forest area, with spotted owls, other endangered species, and archaeological sites spread out through the reservation. Many such requirements are Federal-based. The Navajo Nation has also taken upon itself to also pass environmental protection laws and archaeological protection laws, and having agencies and departments to run these. This is something that the policy makers, your politicians and delegates, your councils should all determine as to how to apply these.

MR. DAVEY: Before you leave the mike, I have another question for Mr. Etcitty. My name is Jack Davey. I'm with the Rosebud Sioux Tribe, Tribal Utility Commission. You alluded to differences that applied to individual allotment land. Could you address that, and tell us exactly what the situation is there, please?

MR. ETCITY: I wasn't addressing individual allotment lands. I believe that was addressed by Mr. Sando. What I was talking about was the differences within trust land. The Navajos try to live in little communities, and residential areas are designated by a type of property interest. We grant grazing permits and home site leases.

MR. DAVEY: Well, I was under an the impression of a considerably different nature, when dealing with the allotment lands where the ownership or the allottees are in question.

MR. SANDO: Everything is handled the same, except for consent. The steps are the same – file an application, meet compliance and archaeological clearance, and then provide consideration of the appraisal.

MR. DAVEY: But I assume the allottee would have to give his permission, right?

MR. SANDO: Yes, we know who they are. If we cannot get their permission, again, there are limited circumstances – probate, someone is missing, or one person refuses to give their consent and we have the majority in agreement, then superintendent can grant the easement on behalf of everyone.

You also need to think about whether your Tribe is providing a certificate of public necessity and convenience to the service provider or if they have a franchise agreement to the service provider to provide you service on your land?

This panel covers the combined issues of sovereignty-taxation and the how other governments impact the Tribal and local service providers' revenues and management on Indian land. The panelist include:

- **Scott Taylor**, Professor, University of New Mexico
- **Cecil Antone**, Lieutenant Governor of the Gila River Indian Community
- **JD Williams**, General Manager, Cheyenne River Telephone Authority
- **Greg Scott**, Member Minnesota Public Utility Commission
- **David Cosson**, Partner, Kraskin, Lesse and Cosson, Washington, DC and former Legal and Industry attorney for the National Telephone Cooperative Association

MR. TAYLOR: My name is Scott Taylor. I'm a professor at the University of New Mexico Law School, and I've been involved in taxation issues in Indian Country for a little over 20 years. When I was in law school I worked for IRS as a summer intern. I worked on a Federal tax case that involved a member of the Red Lake Band of the Chippewa Indians, and that was the very beginning.

Since the late 1980's, I've been teaching a seminar in this area, mostly to Native American students, at the university since the late 1980s.

Today I wanted to talk about general taxation issues in Indian Country and what does it mean if a company or a Tribe is running a phone company within Indian Country?

When you think about taxation in Indian Country, you should think in terms of the political entities that have the power to tax -- the Tribe, State, and Federal government. In any given economic transaction, one needs to at least think, from time to time, about those three competing sovereigns and their desire to tax. Tribes know that States take the position we'll tax now and ask questions later. We know that States and the Federal government are very aggressive in exercising their taxing power. Historically, it's fair to say that Tribes have not been aggressive in exercising their taxing power.

In mid-1980s, the United States Supreme Court ruled that Tribes have the aboriginal power to tax, and what that meant was that they had always had that power to tax. But of course, it took a long time for the Court to recognize that Tribes actually had that power. As a result, taxpayers who were faced with Tribal taxes resisted the imposition of those taxes, arguing that the Tribes, indeed, did not have any power, or if they did, it was no good unless the BIA approved it, or some such arguments.

For those Tribes that imposed taxes, the cases continue. Taxpayers continue to resist the Tribes' power to tax. In the area of Federal Indian law, it turns out that Tribal power to tax is one of the brighter lights, from a Tribal point of view. That is, the Tribes have lost very few cases. When they have, it hasn't been on the question of whether they have the power to tax.

The Bennati case, for those of you who have heard of that actually had two issues. One was the Tribe's power to tax, and the other was whether or not the land involved was Indian Country. That is, a competent Indian community.

It turned out that if it had been Indian Country, it would have had the power to tax. Although it was a tax issue and a loss for the Tribe, it validating the basic principle that Tribes have the power to tax. Now, in terms of what is the limitation of the Tribe's power to impose taxation, legal problems arise related to diminishment. That is, if a reservation is involved and the jurisdictional boundary of the Tribe is not

certain because of that Tribe's particular history. That's a difficulty, because the Tribe may or may not have that power. Until that's determined, the Tribe's power to tax is up in the air.

Big issues related to phone companies involve the taxation of a telephone line, its easement and right-of-way interest, is the Tribe's power to tax fee land within the reservation. What is the nature of the Tribe's power in that regard? The Supreme Court has indicated that so long as there is a consensual relationship between the person being taxed and the Tribe, that the Tribe has the power to impose taxation in that relationship. So, it would make sense, then, if a telephone company had a right-of-way it was based on the consent of the Tribe. Parker Sando indicated that a company cannot get a right-of-way without the Tribe consenting.

Then it seems to me that that's a consensual relationship, and the state of the law is that the tribe can impose its tax on that, as well, even though it's on fee land. Because the members' presence on the reservation is a matter of that consensual relationship. I would point out that although Tribes have historically not imposed taxes nearly as much as states or the Federal government, a common tax imposed by Tribes is a possessory interest tax. The possessory interest tax is a tax imposed on property rights that someone has. As it turns out that a right-of-way or an easement is a property right that a utility company would own. That's a possessory interest, and that would be the subject matter of the taxation.

So if a phone company has a right-of-way, and over that right-of-way was a line, that right-of-way would be a possessory interest. Thus, a Tribe is free to adopt a method of valuing that property interest, and imposing a tax at a rate it chooses with regard to that property interest. One of the larger tax bases of Tribes are the easements that go across their property.

If you looked at Tribes and will find many with tax systems, with possessory interest taxes, a common revenue source. A leading cases involving Tribal taxation is the Kerr McGee case, versus the Navajo Tax Commission which involved a possessory interest tax, and easements. One can find that there is essentially the Supreme Court approving Tribes imposing a tax on these possessory interests.

The bigger question, really, is should a Tribe impose a tax, in this particular situation? Let me start in reference to the previous speakers, and I'll pause for a moment and point out to you that much of the good knowledge that I have has come from listening to Tribal people involved in the kinds of endeavors that JD and Cecil described. If I had questions about a Tribal telephone company, these gentlemen would be the first people I would ask. I just emphasize that, because for me, when I acquire good knowledge for the work that I do, more often than not, it comes from knowledgeable, wise Tribal administrators who have learned all of this as they go along. And it's a great bit of knowledge.

Should a Tribe impose a tax? In general, if the Tribe imposes a tax on itself with regard to phone service, who is going to be paying the tax? Well, it would be the phone users. If the phone users are the ones who are paying the tax, does it really make sense to impose the tax? Why not just raise the rates, if it's a matter of need for Tribal revenues. There might be special circumstances where your base is 60 percent non-Tribal members, and maybe they're used to paying a utility tax or a phone tax. And if they are, maybe in the long run, it would make sense to impose that particular tax.

There are State and Federal endeavors whose activity is subject to a State tax. For example, I am a State employee. I work for the State of New Mexico. They pay me a salary. But they also impose a New

Mexico income tax on my salary. So why not just not impose the income tax and pay me less? Well, they've decided that the system would work better if they taxed everyone, and then worked it out that way. There may be similar circumstances with Tribes

What if the telephone company is not tribally owned? It's privately owned. As I said earlier when thinking about a Tribal tax, people should think of the legal, political, economic, and administrative problems.

The legal ones actually are relatively easy, except for the jurisdictional questions, which get very complicated. Generally, a Tribe has the power to tax, and if it exercises its sovereignty – the right to tax then it is legally valid. There's not really a big question about that.

The political consideration, however, is that elected Tribal officials impose the tax on tribal member who are voters. That has political implications. It seems to me from everyday experience is that additional taxes may make voters angry, and if they see you, as the responsible Tribal leader that anger may translate into not getting a vote from that particular individual or group of individuals.

There are economic implications, as well, and I think it's worthwhile to think about who, in the end, is going to pay the tax. And I'm going to point out here that you should know that States, in particular, are really very crafty about shifting taxes to individuals who can't vote.

For example, visitors to New Mexico, pay the gross receipts tax on hotel stays and food etc. to support the tourism industry. The New Mexico gross receipts tax is a tax you didn't get to vote on, but is applied to a very broad range of items like hotels and foods to get revenue from tourists. Nationally, they're here, they pay the taxes, they don't gripe, or if they do it doesn't matter, because they can't vote. Remember that in terms of economic consequences, if you can shift a tax, that's great.

In the case of phone utility, how do you shift a tax away from anyone other than the ultimate consumer of the service? That would be the phone user. If you tax the utility too heavily, so that they can't make any profit at all, they'll go out of business. They'll close up shop.

If you tax them just right, so they don't pass it on, that's quite difficult, but if you did, then that might be the right amount of tax on the profits of the private company. Because then, in that situation, the users are not the ones who are paying it.

But sometimes it's very difficult to tell who in the end is really paying it. My situation is that the consumers of goods and services are, in the end, the ones who are really paying the tax. So it's very difficult to impose a tax that doesn't get shifted to the end user, so keep that in mind.

Then there is the administrative consideration. That is, if you're going to go to the trouble to impose a tax, it really does make a lot of sense to think about how the tax system is put together. For example, if you impose a tax that raises \$100,000, and it costs \$90,000 to administer the system, are the Tribal net revenues from that really worth it? And the answer may be probably not. So, if you set up a system, you want it to work well, so that the costs of administering it over the long haul with contained.

You heard Cecil talk about, not from a tax point of view, but their concern about turning it into the black. They wanted to make sure that it was self-sustaining, and then, later on, a profitable enterprise. With the

tax system, I think it's appropriate to view that in the very same way. That is, that the tax system should work with a minimum of costs. And one of the things that's a big concern when you develop a tax system is that the taxpayers should be able to figure out what the tax is.

Often times what that means is once the system is put into place, identify all the potential taxpayers and work with them, educate them, teach them how to comply with the system. And they won't like the tax, but they will like knowing how to comply with the tax, because if they can't comply with it, or it's difficult for them to do it, it's added expense for them. Once a system is in place, you need to educate the taxpayer, so they comply.

I want to say a word about State taxation. Will states try to tax the activity in Indian Country? And the answer is yes. They try it all the time. They're relentless. And here I am, a State employee saying that. Aren't I a traitor to the State of New Mexico? An example is Arizona, and South Dakota is another. Every state that has Indian Country in it will try as best it can to impose its taxes as far as possible. What are the working operational rules with regard to State taxation?

Well, with regard to Tribal activity within Indian Country, it's absolutely clear that a state cannot tax the Tribe for activity within Indian Country unless Congress authorizes the State to do so. If the State ever tries to do that, tries to tax a Tribal telephone company, the Tribe should say, where is the Federal law that authorizes you to tax this activity? And there won't be, because as far as I know right now, there are none that authorize the State to impose a tax on Tribes for activities that they undertake.

With regard to members, for activity within Indian Country by a member of the Tribe, the same rule applies. The State should be able to tax that only if Congress has authorized it. So where is the Federal statute? What about non-members? Could the State impose a tax on activity by non-members within Indian Country, and the answer is yes. That's the default position.

The Codd Petroleum case, which came out of New Mexico, said that the State of New Mexico could impose its severance tax on the activity of a non-Indian company producing oil and gas on the Jicarilla Apache reservation.

But in any case, a State can impose a tax, unless it's preempted. That is, would a tax be preempted by Federal law? Is there a Federal law, general or specific, that preempts the State's imposition of the tax? The answer with regard to a private company is probably yes. That is, a phone company that provides a service to the Tribe, should be viewed as either an Indian trader, or what I call an quasi Indian trader.

An Indian trader is someone who is licensed under Federal law to engage in the sale of goods or services with the Tribe. A quasi Indian trader is someone who isn't, but maybe should be. In the case law, *Central Machinery versus Arizona Tax Commission*, which comes from the Gila River Indian Community. When an unlicensed Indian trader sells goods to a Tribe and the transaction took place primarily on the reservation, the State of Arizona could not impose its transaction privilege tax. And so, it's preempted by that Federal law.

So it seems to me that in the case of phone services, if they're provided to the Tribe or to a member, that that case would preempt the State taxation of taxes imposed on the Tribe as a phone, or on the private company, either. That's really what you're looking at. Could the State impose a tax on the private company? And the answer is no, under that *Central Machinery* case.

What about non-members who are consumers? The answer is probably yes. A State could impose the tax if the tax was on the end user, but it seems to me that that may not be too big of a concern. I think it has an adverse effect by affronting Tribal sovereignty that the State can come into Indian Country and impose a tax on a non-member. It essentially prevents the Tribe from imposing as much of a tax as it would like to on that non-member.

So, that's the law. I'm not happy with it. I think Codd Petroleum is the wrong decision, but I'm not on the Supreme Court, so I can't change it.

In connection with the Federal government, there is something here that's important. Tribes are exempt from the Federal income tax, if they have income through their enterprises chartered by the Tribe, or a corporation formed under Section 17 of the Indian Reorganization Act. This income is exempt from Federal income tax whether or not the activity is on the reservation.

If the Tribe decides to run its phone company through a State-chartered corporation, under Arizona law or under South Dakota law, the Federal government now says, since 1994, that that income is subject to the Federal income tax. So Tribes have to be very careful that they don't put their phone company into a State-chartered corporation.

What if a Tribe decides they're going to set up a phone company and charter their own corporation, which they should seriously consider doing?

What about those? Well, unfortunately, there is no current clear authority telling us what the tax status of those are. People have asked IRS, to tell them their your view, and IRS says the law should be clear. We don't need to tell you anything. Which is pretty stupid, in my mind.

I think IRS should just clear it up and treat Tribally-chartered corporations the same as Section 17 corporations or corporations run by the Tribe or activities run directly by the Tribe.

In terms of other taxes, it turns out that most other taxes do end up applying to Tribes, even though I think that this is IRS taking a heavy hand with employment taxes. I think Tribes that have employees are used to that by now, and in the long run, maybe it's better for everyone if the Tribe is paying the FICA taxes and related taxes.. I have mixed emotions about it myself.

In addition, Congress passed two special tax incentives to encourage business relationships with Tribes. One is that Tribes can issue Tribal bonds with the interest exempt from the Federal income tax. They can do that if they're issuing the bonds and the proceeds are use for funding an essential governmental function.

When Gila River Indian Community had needed money to finance their capital program, that they could have issued Tribal bonds, with the interest exempt from Federal income tax. In effect, if the Tribe needs to borrow money, they can, instead issue these bonds, and essentially borrow at a lower rate than private lenders.

There are 2 tax incentives for private companies. One is the Indian Jobs Credit which allows employers of companies that employ members of the Tribe within Indian Country to take a 20 percent Federal tax credit for the wages they pay to Tribal employees. That's a significant inducement. It, however, expires

after the year 2003. Another incentive gives companies rapid depreciation on their equipment that they put into place for utility companies. This would be very beneficial for them, and I believe they can take an asset that they would normally depreciate over 40 years and depreciate it over 15 to 20 years, something like that.

As far as I know, neither of these provisions, which have been around for five years, have really made much of a difference in terms of economic development in Indian Country, in terms of private money coming to a reservation.

MR. ANTONE: My name is Cecil Antone. I'm the Lieutenant Governor for the Gila River Community, and I appreciate the invitation to speak on, I guess, our history of our telecommunications company, and the efforts and the trials and tribulations we had to go through to be where we're at today.

As Tribes look into going into the business of telecommunications, our situation at least can give you a general plan. First our plan and a goal to establish our own utility company, whether it be electrical or telephone or gas. This plan was adopted probably 15-20 years ago. Essentially it said the Tribe wanted its own utilities simply because of the problems with US West. US West was charging somewhere \$40 to \$3000, or [for phones]. In some cases you'd go a quarter of a mile and US West wanted \$10,000. Obviously, no one could afford it.

We hired consultants. You heard some of them speak this morning on what they can do, and how they can be beneficial to you as far as establishing a company. At the same time, we got a proposal from a group of Oklahoma telephone companies that were interested in setting up a telephone company in our community. And so, we decided to go forward with that company an ultimate determination to own it, at time one 100 percent.

This occurred when cellular were being offered in various areas of the country. We applied, but unfortunately, the other companies had applied for the area and the Rural Service Area (RSA). They all agreed in advance if they won, they'd share it among the group. We asked them if we could participate and they said no. So bid on our own and won. The other guys started screaming.

I know that the cellular license is not part of the phone system, however, relates because both issues require the Indians to deal with FCC. This issue was quite unique for the FCC because they knew nothing about sovereignty and so forth. Dave Cosson can understand that because he helped us out when he was at NTCA. We got the license, but it took us a while to get that going. To get the license, we established two customers - wire line area and non-wire. The two customers could only talk to each other and not with the outside. With those two customers, we started our telephone company. They made us eligible to apply for this lottery. So, and we won.

We had some growing problems. A couple council members got recalled, for pushing to have our own telephone company. The people wanting the council members not to pursue a company were the ones with existing service with US West. The majority of the Tribal members didn't have access to phones, and so that confirmed our concerns for Tribal members. That was the other reason why we went into business. The council members got re-elected. I was the chairman for about five years when we started the phone company.

I caution you, when I say change -- you got to make sure that your members want that change. If they don't then you will have some problems, both politically and socially, with your relatives, and so forth. You know how Indian politics get sometimes.

Regarding this discussion on State and Federal government, the State Corporation Commission in Arizona, at this point did not interfere as far as I know, except they denied us universal service. On the federal level, we dealt with the FCC and our funding agency, the RUS. I'm not sure, I think we're in our D loan, I'm not sure, D or E. But it was a big step for us, and a lot of work, too.

I've been on the board for the last four or five years. I don't know exactly the total members of the Tribe that are working there. Probably close to 20-25. But at least I think 98 percent are members of the Tribe. They really are proud of their position, and the jobs they do out there. And I guess the other thing is that -- and it was mentioned briefly in the booklet here, about gaming.

We are a gaming Tribe, so we need services and supplies and so forth. The gaming helped the phone company to grow. There are spin-offs relating to these types of developments. I think the phone company has about 3000 subscribers -- up from 500 -- it grew slowly.

A phone company needs to consider its investment and the monies you borrow. Our projections had us getting out of the red in about six-seven years. It only took three and a half years to get in the black, so we did fairly well. As for cellular, we didn't pay a dime. We just won the lottery and started to build with the community systems [customers] paying all the costs. The Tribe didn't put a dime in because of its' ideal location for service --it's between Tucson and Phoenix, with Interstate 10 smack in the middle. We just got it rolling.

I was going to comment earlier on the right-of-way. Some of these things, you're going to have to deal with these other forces that are out there, cell companies that are providing PCS service. In fact, last week, ADOT, Arizona, Department of Transportation came down -- we still own 25 percent of the cellular service --because our competitors [Cellular One] wanted to go through the Department of Transportation to place their towers on the highway right-of-way.

As you've heard already from the Bureau and the Navajo Nation those rights-of-way are for that specific purpose. If change it, we needed to re-negotiate the right-of-way, but it would not be like the \$2 an acre initially paid about 40 years ago. So they backed off. Once you get in the phone business, these situations come up. You need to make sure that you're very cognizant about the outside, because these big Bell companies, or big companies are really shrewd people. They'll try to find any way to try to get in your community.

Earlier the Certificates of Convenience and Necessity (CC&N) was mentioned. You need to have a CC&N; we got ours from the council. The CC&N gives the Gila River Telecommunications control over all the telecommunications throughout the exterior boundaries of our community. So any type of phone company that wants to try to do business, they must go through our phone company.

Before our phone company had the CC&N, US West provided service. That was another because US West didn't want to sell it. We went to Washington, and met with Senator Hannaway, who was at the time chairman of the Commerce Committee, which oversees the FCC and through the agency all the

phone companies. He called the CEO at US West in Denver, told him our dilemma, and the next day they were ready to sell. So sometimes you need to use political clout. In this case, Hannaway really helped us out.

It was a struggle to buy this system. We paid fair market value because we needed the service, though it wasn't worth the \$2 million. But anyway, that was what we went through at that time. It was a growing experience for all of us, at least myself, because I was the chairman for five years. My name was blood out there sometimes in the seven districts because people don't want to change.

But in this case, we had to change. Today we have phones, cellular, and CATV, the cable, and now they're on the Internet. So it's a very diverse company. I'm very proud of it because it's my growth in working with Tribal government.

I also had to deal with all the rights-of-ways, too. Our reservation is 372,000 acres, and a third of the land base is allotted land. It's very difficult to do rights-of-ways, because you have to get consent, 51 percent of those allotments. I also did road rights-of-ways. It was very difficult. You need to think about how you're going to do those things. Every time you go to a land owner's meeting, different people show up. You'll never have the same group.

But as far as GRTI we all strive a 100 percent owned and operated company by Tribal members. It's very important that we all strive for that as Tribal leaders, to try to have our own departments and programs, and have the directors be Tribal members. I know JD's situation, we tried to snag him, but he didn't want to come to Gila River. I guess we didn't offer to pay him enough money.

It's been an experience -- maybe I'll write a book sometime on our experience trying to get into the telephone industry. But it's was worthwhile. I think about five people that are going to school to be engineers in telecommunications, which is great, because that's, you know, something there for the future.

MR. WILLIAMS: My name is JD Williams. I'm general manager with Cheyenne River Sioux Tribe Telephone Authority (CRST), located in Englewood, South Dakota, Central South Dakota. We've been in existence since 1958, and I believe we enjoy the role as being the oldest telecommunications company in the United States. We just celebrated our 40th anniversary, and it's got a long history.

In 1977, we became an REA borrower and took all of our plant underground with a single party line. Today we have 2700 access lines in a 4600 square mile area that encompasses the entire reservation and two counties. We employ 30 people and 95 percent are high school graduates. The message behind that is that you can do it with local people. You don't need to go out and recruit. It's just hard work. And if you're willing to do that, you can have a phone company, like ours.

We're a very diversified company. Once you start something in your reservation, you'll find other business needs or service needs of your community that you may go into. It fills several niches that perhaps that US West or GTE is not doing for you currently.

Our company, besides operating the basic dial tone service over that huge area we offer paging. We've become a Cellular One dealership a couple years ago. We're a part-owner with South Dakota Network, which is a long distance company all-fiber network. This takes us our toll into another switch. I believe

there's 29 companies are part of that South Dakota Network. We just formed an internet service called Lakotanet service that will go on-line August 1.

The Tribe also gave us for six years the task of running a Tribal grocery store. Before us, the Tribe had leased the store to a non-Indian for twenty years. Ownership was placed under our corporation with our board serving as the interim grocery marketing board. I was president of that corporation. We built a new grocery store from an 8000 square foot to a 17,000 square foot, and it grosses about \$5 million a year. After 6 years, we turned it back to Tribal ownership.

Today our big venture is forming a separate business entity called Lakota Technologies, Inc., and we've just submitted our 8(a) papers here last month. We hope to go into data processing. After visits to the people in the north that have done this successfully, we believe there's a niche for us to create jobs within a reservation economy. If this works, it will make our phone company look small.

So again, CRST is quite diversified. In '87 the Tribe gave us a propane company to operate. Since 1987 we have operated a CATV company where we serve 760 customers in four communities. We also have arrangements with DBS on a small dish satellite with Direct TV. In four years, that's grown to 865 customers out in our rural areas, and that's a real cash cow operation for us. As a result we are highly visible in the community as technology people.

In 1994, there were 67 telephone exchanges owned by US West, and they were offered for sale. And There are independent telephone companies in South Dakota. We entered into a consortium to offer a bid for those 67 exchanges. CRST was successful as a consortium member on three telephone exchanges that fell entirely within the Standing Rock and Cheyenne River Sioux reservations.

From the very beginning, we suffered political opposition from the White community. We only purchased 367 access lines in those areas. The South Dakota Public Utility Commission, under a new Senate Bill 240 allowed the Commission to review each sale individually based on seven points. If it did not fall into those seven points, they could disapprove the sale. In the end, we were the only company that was disapproved. Today, we're still not owners of those three exchanges. Meanwhile, the other 19 successful buyers of the 64 other telephone exchanges have had ownership for two years.

CRST went to the PUC twice and have been disapproved. We were also disapproved by the South Dakota Circuit Court. Now we're headed to the Supreme Court of South Dakota. We also have a Federal court case pending, where we've sued the three commissioners individually for damages. The Federal case has been put on stay until we exhaust all the local remedies.

In the meantime, the Telecom '96 Bill passed and change the environment in which we operate. Section 253 looks at increasing competition. We filed a case under that. We know FCC will take a look at the case and will rule in our favor. That's pending right now, and I have high hopes that we would overrule all of the South Dakota decisions by the Court and the PUC.

So far, we have expended over \$200,000. I once went to a room that had ten lawyers, and I was the only layman. So, there will be cases where states react differently to Indian telephone companies. Arizona and South Dakota are at the other end of the spectrum. Some of you other folks will experience perhaps somewhere in the middle. You won't know that until you start wanting to become a vendor.

Right now, the non-Indian society, traditionally, looks at you as a customer. When you become -- are a vendor you don't know how they're going to treat you. There may be some new laws against you. They may stay away from you.

As I said, Arizona and South Dakota really represents both ends of the spectrum. From our experience of going to court so much, I advocate a Tribal utility ordinance. The Rosebud Sioux Tribe has been very successful and we've looked at their utility code. It covers the gamut of water power, telecommunication. If you're interested, I'm sure that they would share that with you.

Our Tribe has always had the cart before the horse. Other Indian-owned telephone companies may be the same way. We tried unsuccessfully to get a utility code passed. We're in a homestead area where there's a lot of white people, similar to Gila River. Even the Indian people will fight you, saying, well, if you do something that puts that structure in place, then you're just going to run the costs up. So all of a sudden you got new opposition from within. So be ready to experience that.

That's what we are doing locally. Every time we went to court or before the PUC, the first thing they say, "do you govern yourself through utility commission work?" The answer is no. The PUC has been governing us 40 years on the reservation through the state utility ordinance and, as such those ordinances are used to base their arguments. It seems that judges listen to the PUC arguments. So I'm advocating to our board of directors, that we've come up with our own narrowed telecommunication policy. A lot of the fight on our reservation is coming from water and power.

The Rosebud Sioux Tribe is going to bring their utility commission up to help convince our Tribal Council that they need it [a tribal utility commission] and show them that it does work on their reservation. We're pushing forward because we realize that we'll be back in court someplace. If you don't have a utility code, somebody is going to come and run right over the top of you. If you already have a telecommunication company in place, if still lack built-in protection, competition may run right over your existing company.

If anything, I'm advocating to Tribes, that while you may never be a telecommunication provider, you should start becoming involved from the utility code aspect. Govern yourself, or else somebody else will want to govern you. A code is a great stepping stone into something else.

MR. SCOTT: My name is Greg Scott, and I'm a public utility commissioner from Minnesota. I believe in sovereignty and it became a personal interest of mine before I joined the Commission. The first message that I want to convey is that there is a great deal of educating that you folks will have to do. A couple of gentleman said that counties and PUCs don't know anything.

What I would really suggest that as you get further down the pipeline to pursue a telecom or some other utility interest, that you sit down with the Commissions. Even if the position is you don't get to regulate us, sit down anyway, with them, and have that dialogue, and have that discussion. I think it will help a great deal.

The other part that I'm not sure that you can deal with quite as effectively is that there will be an awful lot that those folks will have to unlearn what they think they know. The regulatory world is like two asteroids colliding in mid-space -- sovereignty and a very highly regulated industry.

And a lot of these Commissions are driven by the entrenched State employees who have been there 25 years, and by God, they remember when Ma Bell was still one company, and you know, they have a hard time thinking outside of that box. So there are fairly large hurdles to overcome internally.

I want to make a comment about sovereignty. I don't know how many of you are familiar with the Supreme Court decision that came down in May? It's Kiowa Tribe of Oklahoma versus Manufacturing Technologies. Let me just give you the facts just real quick. Kiowa, an Oklahoma Tribe, decides it wants to invest in some stock in a company, and signs a promissory note, I think, through a broker, for \$285,000, and then defaults on the note. Doesn't pay it, for whatever reason, the case doesn't say.

The holder of the note sues the Tribe in State court to enforce the note. The State court rules that you can collect on the note. The Supreme Court reverses that decision, and finds that sovereignty precludes that suit in State court.

And as you read the case, you'd say this is a wonderful decision for sovereignty, because the holding, essentially, is that sovereignty applies to a Tribe's commercial endeavor, even if this note was signed off the reservation. So sovereignty applies to a commercial endeavor taking place off the reservation. At first blush you say that's a fabulous decision. That means that JD should have a slam dunk win in South Dakota.

Initially, you'd say this is a wonderful decision for sovereignty, because the holding lets sovereignty applies to a Tribe's commercial endeavor, even if this note was signed off the reservation. So sovereignty applies to a commercial endeavor taking place off the reservation. At first blush you say that's a fabulous decision. And it means that JD should have a slam dunk win in South Dakota.

But what troubles me about a case like this is two things: First the Supreme Court language invites Congress to jump-in and change this. Following a discussion on the history of sovereignty, the Court goes on to say, *"There are reasons to doubt the wisdom of perpetuating the Doctrine. At one time the Doctrine of Tribal Immunity from suit might have been thought necessary to protect Tribal governments from encroachments by States. In our interdependent and mobile society, however, Tribal community extends beyond what is needed to safeguard Tribal self-government. This is evident in Tribally-owned ski resorts, gambling and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with the Tribe, who do not know of Tribal immunity, or who have no choice in the matter, as in the case of tort victims" - somebody slips and falls. "These considerations might suggest a need to abrogate Tribal immunity, at least as an overarching rule. We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment."*

Now, when I read that, what I hear and see is ouch. And so, we need to figure out the role that sovereignty will play when dealing in these highly regulated environments, and to structure it in a way that the non-Native community can and will uphold sovereignty and be comfortable doing so.

What intrigues me about a decision like this is a complete absence of any discussion of what the Tribal court in this case may have provided for a remedy. If there is a Tribal court, the note holder could have gone there to enforce this promise to pay.

What JD said about Tribal utility codes and commissions is important. Because if my analysis is right, ultimately non-Native American judges and Congress will try to figure out what to do with sovereignty, they will ask questions, "What kind of remedy can people obtain in a Tribal court? What kind of remedy is available in a Tribal commission? Is there a Tribal commission that is regulating this utility in a way that we can feel comfortable that sovereignty should be upheld, because there's fairness in the system?"

Now, you can argue about whether they should even get to do an analysis like that, but the reality is non-Native American judges who will be deciding these issues will do that.

And so, it puts in a spotlight, what you are doing with your Tribal courts, how you're doing with your utility commissions. If there's a tribal utility commission you change these facts. If not you have JD's situation, where a State Public Utility Commission refused to approve the purchase of a telephone exchange by a Tribe because the Tribe asserted sovereignty, and the Commission believes it can regulate because it has historically.

I would think that those judges will then take the step of saying what is the Tribe doing to regulate this utility on its own? And so, I agree with JD wholeheartedly, and I think it's very important that if you decide to get into the utility business, that you have a utility commission or code of some kind, so that the non-Native judges can feel comfortable that if they continue to uphold sovereignty, it doesn't end up in an unfair result.

I want to comment about competition in rural areas. In Minnesota, our experience and precisely the opposite. In Minnesota, we are finding that competition is developing faster in rural areas than it is in urban.

I have conducted a number of forums with industry folks where we talk about competition. People in the rural areas, especially US West rural areas, are so incredibly annoyed, dismayed, frustrated, that competition is actually starting in those areas first. In many situations, the genesis of the competition is the municipalities, the cities. The cities will go out and start their own telecom or cable company.

The Minnesota Public Utility Commission just approved certification for a competitive local exchange carrier a couple of weeks ago who told us that they want to be the CLEC of choice in the rural areas. They are targeting rural areas. I've tried to think through, how does sovereignty fit with issues like interconnection.

You know, if you start a competitive local exchange company, at some point I assume you will have to interconnect your network with the incumbent carrier network like the GTE network so your customers can access the toll networks.

Federal law says that State Commissions like mine have to approve interconnection agreements. So, even if the Tribe has sovereignty, GTE, or whoever the incumbent carrier is, does not, and will have to bring it in for approval.

I have not figured out how this all works together. By the truth is, what you have to do as a CLEC is much less burdensome than when you're considered an incumbent local exchange carrier. It's much less burdensome.

So, in Minnesota the rule says that essentially, "No person shall provide a telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services." That's the basic standard up until last week. For the most part, these applications are rubber stamped. Boom, boom, boom, no big deal. Competitors are now watching who comes into their existing territory are now starting to challenge whether the company wanting to come in has the technical, managerial, and financial resources. Last week the PUC had a challenge in a rural areas where the company wants to be the CLEC of choice.

The parent company of that company has been in the phone business for 98 years. They had this whole list of credentials, and things they've done and companies they've started, and nonetheless, a couple of cable companies that are serving in the area where this CLEC wants to come in decides to challenge their credentials.

It is ridiculous because the criteria isn't particular burdensome for CLEC status. You have to show you're going to comply with the 911 rules and some of this other stuff. But competitors out there might decide to challenge the credentials of the new folks coming in.

I can tell you, as a Commission member, we are looking to encourage competition, and the odds that we're going to kick out somebody's application on that basis are extremely slim, because my view, for example, is, well, let the marketplace decide.

If somebody applies that doesn't have the skill to pull it off, well, I guess you're going to lose your customers. Sorry. But that's not for me to decide. Let the marketplace decide.

MR. COSSON: I know I'm the cleanup hitter, the only thing that's standing between you and some afternoon relaxation, or whatever. Most importantly, we'll try to get through my slides which are in your handout fairly quickly, then we will have open it up to questions and discussions.

The attorneys on the panel recognize, the most important members are JD and Cecil. They can tell you what you will face and how hard it is to succeed.

Of my 24 years with NTCA, some of the most satisfying was working with companies like Gila River and CRST. Today I will give you a quick summary of the involved regulatory factors.

Following Rick Askoff [Universal Service morning panel], I suppose, you're entitled to one more joke about lawyer. *Three men were traveling late at night on a right-of-way highway through a reservation, when their car broke down. So, there was a nearby house, and they went up and asked a resident if they could spend the night until they could get their car fixed. He said, well, certainly, but I only have two extra beds, so one of you will have to sleep in the barn. Now, I should point out an unusual thing about the three men who were traveling here. They were all of different religion. One of them was a Hindu, the second one was a Muslim, and the third was a lawyer. So, when the call came for a volunteer to sleep in the barn, the Hindu spoke up right away, and said I'll be glad to sleep in the barn. I'm a humble person. And he went on out, and the other two started getting ready for bed. Well, in about two minutes there was a knock on the door and the Hindu was back, and he said I'm sorry, fellows, but you know, there's a cow in the barn, and you know, cows are sacred to my religion, and it -- it will really be blasphemous for me to sleep in the same building with a cow. Well, the Muslim said that's okay. I'll be glad to sleep in the barn. I don't mind cows at all. And he went out. Well, about two minutes later there*

was a knock on the door and the Muslim was back, and he said, you know, you didn't tell me there was a pig in the barn. Pigs are unclean in my religion, and it would clearly be blasphemous for me to sleep in the same building with a pig. The lawyer jumped up and said, That's okay. Just because I'm a lawyer doesn't mean I can't sleep in a barn. There's supposed to be nice straw out there. So he went on out, and about two minutes there was a knock on the door. It was the cow and the pig.

If you get into the utility business, you will face the kinds of things that telephone companies have to deal with every day.

FCC Accounting Requirements: You need to follow Generally Accepted Accounting Principles. Regulators will tell you what the number of the accounts, what the accounts are, what goes in which account, and so forth. You will have to get somebody that knows how to do that kind of accounting.

Division of regulated and unregulated businesses. For example, the CRST is in the old telephone business, plus CATV, mobile telephone service, and Internet. They've got a lot of things that aren't regulated services. So you got to follow some particular rules to divide them up. You may also have multiple entities, and affiliate corporations. Perhaps your CATV company in a separate corporation from your telephone company. FCC has rules about how you divide the revenues and expenses between those.

Jurisdictional Separations: The telephone plant is used for both intrastate calls and interstate calls. There is nonarbitrary way to divide that, and yet, the FCC is regulating the interstate use of that plant and telling you got to compute what the interstate cost is. There has to be a formula. Historically that formula was developed through negotiation between the FCC and the State commissions. Later Congress formalized that position, and requires something called a joint board. Though tribes are not subject to direct regulation by State Commissions, they sit on that joint board and have an input into how these rules are finally made.

One of the things Congress, in its wisdom, has done, is deregulated pay phones. This is an unmitigated mess. I don't even pretend to be able to explain how it works, except that now there's all kinds of questions: How does a telephone company get paid for pay phones? What does the user have to pay. How do long distance companies get paid when their calls are made over their service on the pay phone? What do they have to pay the owner of the pay phone? The FCC has a lot of regulations on this. Most of decisions have been thrown out by the courts, and just go back and start writing the rules again.

Toll rate averaging is another rule that came in through the 1996 Act, and this is something that clearly benefits the Tribal community, because you're rural areas, for the most part. It says long distance companies have to charge the same rates in rural areas as they do in urban areas, and the same rates in each state etc. In some ways that has a good effect. The fact that even though access charges in rural areas are much higher, long distance companies supposedly can't raise their rates. The other side of that is, of course, you decide to go into the long distance business, you have the same obligations.

Wireless licenses. Cecil told you a little bit about how the FCC passed those out and how they affected everyone. But in effect, you may need licenses to provide wireless services, both fixed services and mobile services. These FCC's rules are quite complicated.

Acquisition approvals and waivers. If you, for example, take over territory from US West, or GTE, the FCC gets to approve that with something they call a study area waiver. This goes back to 1984, when

the FCC said telephone companies shall operate within the boundaries they have today, forever, unless we give them a waiver. Now every time there's a change from one way or the other, you have to go to the FCC and jump through a lot of hoops. Normally this hasn't been a problem, as far as getting ultimate approval, when you're showing that, in fact, you're taking over and going to greatly improve telephone service. However, the FCC, from time to time, put some conditions in on how much universal service a telephone company can get, and those -- that's proved to be problems

Tariff rules. As Rick mentioned, most small telephone companies have NECA, National Exchange Carrier Association, file their tariffs for them. So, what this means is NECA essentially files one rate. In other words, they gather up all the NECA pool members' costs, they divide it by all the NECA pool members' demand units, whether it's minutes or lines or whatever the case is, and that's the rate. If your costs are above the NECA rate, you not only keep all the money you collect from providing access, but NECA sends you a check. If your costs are below the NECA rates, then you send NECA a check. In the end, everybody recovers their cost.

The FCC controls how much you are going to earn because your tariff has to be designed to recover your revenue requirement. The revenue requirement is defined as the cost of providing service, plus the allowed rate of return times the net investment. These rules apply to small companies. Large companies are on a different rule. The FCC's prescribed rate of return is 11.25 percent. It's been that way for a long, long time, even though the economy has gone up and gone down. Basically the FCC doesn't want to go through the hassle of changing that rate, so it will probably stay there for a while.

You know, good news is that you at least have an opportunity to earn that much. The bad news is you can't earn too much more from that. They have elaborate pooling rules. They tell NECA, in fact, how to divide the money up.

Internet usage: Internet traffic is essentially interstate communications. Yet it's treated, for all the purposes of regulatory rules, as if it was local communications. That's causing a lot of tension in some places, and some severe problems.

Now, one theory is well, maybe, you know, we'll grow out of that, but that's going to be a big bone of contention for quite some time.

Video Business: The Federal government regulates video, but it's not the FCC. The Federal Copyright Office will tell you how much you have to pay in copyright fees.

Pole Attachments: The FCC regulates pole attachments. An exception in that statute tells you how much a cable company can pay you for use of your poles. There is an exception if the State takes over that regulation. I don't believe that's ever been questioned as, well, could the Tribal regulator take it over in place of the State. The statute says State, it doesn't provide for Tribal utilities.

Universal Service Rules: Very important. The FCC is in the process of change, as you heard from Ed Cameron. Clearly, the FCC will take a long time in doing that, however, for small telephone companies, which would include all the Tribal utilities. They realize they have problems with their models. The commissioners have now said things like the 2001 is not even a target date. That's just the earliest possible time. Hopefully you'll hear some more from Commissioner Tristani on Thursday as to when she expects that to happen.

The Feds not only control, you know, how much income you have and where you put it. They also control a lot of things about what you have to spend. For example, if you t into the business, one of the things you have to do is to provide equal access to all long distance companies. If you are an existing company, there are some costs. As a start-up company, those costs are in the switches.

Number portability: It required by the '96 Act. The idea is that people won't want to change their phone company if they have to change their phone number. So the law requires you to come up with a system so that people can keep their same phone number to improve competition. This is an expensive thing to do. The FCC has some weird rules on how you're going to recover that cost, which we're going to try to get changed.

Dialing parity is a variation on that, but it says all competitors have to be able to dial the same numbers. There's a cost of doing that.

Universal service requirements. To get these funds, you have to provide certain quality of service, be able to provide certain levels of service, and so on.

CALEA (Communications Assistance or Law Enforcement Agencies) A Federal law that says no matter how much you change your technology, a law enforcement agency such as the FBI are still going to be able to come to you and be able to intercept the communications of any of your subscribers. he FBI can prescribe how much capability you have to put in. In other words, how many simultaneous interceptions you have to be able to provide at any one given time. There is a provision for some government payments, if you have to upgrade your switch. Again, you're going in new, that wouldn't apply. There are lots of arguments going on about how this law applies now, and it may be changed.

State modernization plans, if you want to use RUS money, you must participate in one of those.

Administration costs:. All telephone companies are going to have to contribute to the costs of administering numbers. In other words, who gets them, and what have you.

Environmental and Human Resource Rules: the same that apply to any businesses. To the extent that they apply to you as a Tribal business, they have a cost to them.

Service Restoration Rules: You have to be able to provide certain priorities, if service is taken out by some kind of natural disaster, and the biggest natural disaster, of course, in the telephone industry is some clown riding on a backhoe.

Let me stop at that point, because I think Greg has covered the State issues pretty well, and let's -- let's have questions for the whole panel. Yes, sir? Go ahead.

UNIDENTIFIED ATTENDEE: Is the year 2000 compliance going to become an expense?

MR. COSSON: The question was, is the year 2000 compliance going to be a part of your added expenses, and I think certainly the answer is yes. The FCC has been holding semi-informal discussions with the telephone industry, sort of asking the question, "Are you going to be in compliance?" They also have a task force, which is headed by Commissioner Powell. So far, they haven't really adopted any formal rules yet. But probably are going to. Yes, sir?

UNIDENTIFIED ATTENDEE: This question is for Greg Scott. If I form a public utility authority, at what time can I ask for the State public utility to step aside, and how, and for Professor Scott Taylor, how do you do to switch over plant taxation at that time?

MR. SCOTT: My view is that you shouldn't have to ask them to step aside. They should do it. But let's assume the South Dakota view, rather than the Arizona view, and they decide they're going to get involved. I think the way that it would typically come up is in the process of going through what a non-Native American company would have to in the regulatory scheme.

The first time you appear before the Commission, I would suggest that you say that we are not subject to regulation by the State, and here is our support for that. That's why I suggest you have meetings before you actually get into a hearing setting, so that people start to understand some of these dynamics.

And then, to me, the fact that you have your own commission simply makes it easier. I mean let's face it. There's a game to be played here. It's a bit of a game. But it makes it easier, I think, for these regulators to let go, when they see that you have these systems in place.

So, the time to do it is the first time you find yourself having to appear in front of the Commission. In Minnesota, this would occur when you when you ask for a certificate of authority to be a competitive local exchange carrier, assuming that you need one, which frankly, I'm not even sure you do.

The next time that it would probably happen would be when the incumbent carrier with whom you must interconnect has to come in front of the Commission to get the interconnection agreement approved. It would be at that point that I would raise the issue.

MR. COSSON: I'd like to add that if you're in a situation like Cecil and JD where you're buying an incumbent, the State Commission may not be able to regulate the Tribe. But they can, in most cases when the selling company gets permission to sell. The FCC needs to grant permission before large companies can sell.

And you know, I think that's how they got, JD? Is they had US West -- they refused to give US West permission to sell. They didn't purport to tell JD who he could buy. It just said they can't sell.

Part of the process is, in talking to them and, in fact, pointing out that why they should allow the existing company to sell is because, in fact, the consumers are going to be better off.

After all, that's what the State is paying them money for, is to benefit consumers. And that's exactly what's not happening in South Dakota. Those consumers would be a whole lot better off if JD was their phone company than US West. And the State, in the name of protecting consumers, you know, is hurting them. The way to avoid that, perhaps, at least try, is I agree with Greg. You know, go talk to them first, and point out how the consumers would be better off.

UNIDENTIFIED ATTENDEE: I'm assuming that our local exchange carrier is also collecting State taxes. If you form your own Tribal utility organization and you have your own tax code, how do you switch off the State taxes and switch onto your local, private taxes?

MR. TAYLOR: Is the carrier going to remain privately-owned the whole time, or is this an existing private company that the Tribe is going to purchase?

UNIDENTIFIED ATTENDEE: Well, we're trying to purchase, but we haven't done that yet.

MR. TAYLOR: Oh, for me, anyway, it is a very fascinating question, because you have a taxable entity that you're purchasing, and you can control the tax consequences by the way you would purchase it. From the Federal income tax point of view, if you purchased the assets of the company, then the Tribe itself would not inherit any of the tax -- income tax liability that might be associated with it.

If the Tribe purchased the corporation itself, and it was a State-chartered corporation, the next natural step, would be to liquidate that company. Once that was done, any income tax gain in the assets would be triggered. Under existing Federal law, that gain would be subject to the Federal income tax. That's just the income tax side, so those are a couple of possibilities.

In terms of the State taxation, once the entity becomes a Tribal entity or a Section 17 corporation, in my view, the Tribal entity just stops paying the State taxes that it's subject to, as of the date it becomes a Tribal entity.

The Federal part is a little bit more complicated. The seller is going to have something to say about it. If a utility company is sitting a \$5 million gain, and that gain is subject to a marginal rate of tax of 30 percent, you can figure out that the tax involves quite a bit. Neither the tribe or seller want to get stuck with the tax. If both parties know what they're doing, they might be able to structure it to minimize the tax consequences.

UNIDENTIFIED ATTENDEE: I'm assuming that they're not going to seriously reenter negotiations until we assert some authority and say excuse me, but we can tax you, and also, we can set up an authority to regulate. At that point, they'll probably change their opinion.

MR. ANTONE: I guess first of all, talking about taxes, our phone company does pay Tribal tax, but that tax was in place before our company. Initially, the tribe had a 51 percent ownership. On the 49 percent ownership, that non-Indian party paid State tax. When we bought them out, we never paid State tax, but we still pay Tribal tax and Federal Indian tax.

UNIDENTIFIED ATTENDEE: First I'd like to commend each of the five speakers. I thought your presentations were excellent. Thank you. I would very much like to hear Professor Taylor's comment on the court case in Oklahoma that was presented by Commissioner Scott.

MR. TAYLOR: When read the case and I was gratified that the Court recognized sovereignty related to the Tribe. While I was sitting here, Cecil said to me, well, sovereign immunity can be a problem, because it can be difficult for Tribes to deal with people. But he would probably agree with me that it's something for the Tribe to waive, not the Federal courts, not Congress, not anybody else.

I share Commissioner Scott's concern about the invitation from the Court for Congress to step-in. I've always had a major problem with Congress unilaterally taking away sovereignty without a Tribe's consent. During the 19th century, it was clear to me that up until the General Allotment Act in the 1880s, up until that time, the Federal government had at least believed that it couldn't do things to Tribes

without their consent. The Federal government seemed to be able to succeed to get any and all land that it wanted to get anyway, with the Consent Doctrine.

I'm personally very unhappy with this Plenary Power Doctrine that Congress has been given by the Courts. So, I guess it's now a political question of how well Tribes can individually and by acting together, protect themselves from Congressional intrusion into their sovereignty. That's in fact what the invitation from the Court to Congress is. I guess I share Commissioner Scott's concern that something horrible could come out of Congress for Tribes, and there could be a serious erosion of sovereignty.

My view is that erosion of sovereignty should be up to the sovereign to give up, not for anyone else to take away. So that's my own view and comment about it, and critique of some of the law the Supreme Court has developed in this area.

UNIDENTIFIED ATTENDEE: Is appropriate thing for the court to issue an invitation for the Congress?

MR. TAYLOR: Actually in the tax area, Federal tax area, it's extremely common for the Court to say, look, Congress, you write the laws, and if you can't do them clearly, we're just going to leave it this way, and you fix it, because it's your job to fix it. We're not the legislature. You go ahead and fix it.

So, what they're saying in this case is sovereign immunity is where it is, and we may not be happy with it, but it's not our job. That's Congress' job to fix it. I Congress has can negotiate with Tribes and both parties can agree to certain arrangements, but I don't Congress has plenary powers.

I asked the question where in the Constitution does it say that Congress has plenary power over Indian Tribes, and it doesn't say it anywhere. The Court just read it into the Constitution. It's probably too late to go back, but it seems to be appropriate to grouse about something that is unfair once in a while

MR. GARCIA: A question for Cecil Antone. First a simple one, but it leads to the other part. And the first question is, do you provide services to non-Indians off the reservation?

MR. ANTONE: Presently, no. It was just on the reservation. If we go off the reservation, then we have to deal with the Corporation Commission.

MR. GARCIA: Okay. If a phone company provides service to 30, 40 percent, maybe even 50 percent to tribal members, is that phone company obligated or mandated to sell or negotiate with a Tribe that wants to take over their portion of the phone services?

MR. ANTONE: I guess there are several factors. First, the Tribe has the ultimate authority. The Tribal council as the governing body for the whole community, can make that determination. Your tribe will need to determine if it is feasible to operate less a portion of the local service area. As I mentioned earlier, you will have people with service and those that do not and, the people with service won't want to change. And sometimes very difficult. There are of other factors -- it depends on each situation. For us, it was too expensive to purchase service from the other entity, at that time US West, so it was cheaper for us to do it and get an RUS loan.

The other thing I wanted to mention, that RUS, or at that time REA, was a big factor on why we went forward. Under RUS rules you cannot charge the construction deposits to the individual that's getting the service, the construction costs. You can charge after they get the service, but not before. So that's a big plus, because US West was charging about \$10,000 for less than a quarter of mile for service.

MR. GARCIA: But can the phone company outright say we don't want to sell any of our service area? Can they do that?

MR. ANTONE: If they have a CC&N from the Tribe then that's something that the government has will have to handle. If they lack tribal CC&N permission to be that is another case, even if they initially went to the State Commission to serve the reservation. Any time you get a CC&N, it's for a specific area. If you don't have that, you have really no authority to service the area.

MR. GARCIA: So even right-of-ways is not explicit permission to provide services?

MR. ANTONE: Right. It's just for the use of that land.

UNIDENTIFIED ATTENDEE: This is for Scott Taylor. Some clarification. If a cable company wanted to run fiber optic run through a reservation, that's comprised of both fee land and trust land, can the tribe tax them on the fiber run?

MR. TAYLOR: I'm not sure if there's a case that's decided that definitively. You need to look at some general cases on Tribal power to tax within Indian Country. Courts look at the definition in 18 USC 1151, which says all land within your reservation boundaries is Indian Country, so that would include fee land. Another case, Montana versus United States, generally says that Tribes have power to tax fee land in areas like taxation, when it involves a consensual relationship, or health or welfare.

The license to operate establish the consensual relationship between the Tribe and the line carrier. The right-of-way is also a consensual relationship. However, as I said there's no existing case that definitively answers that question. So Tribes a lot of fee land, are wondering if their Tribal power to tax extends on that fee land. It's one of those things that the Tribe has to assume the power, attempt to collect the tax and have the resources to back up the claim.

Most Tribes with a tax systems, have their own dispute resolution mechanism which forces the tax payer through the Tribal tax administration and judicial system. If goes to Federal court, then the Federal court looks at the legal analysis of the Tribal judges or the Tribal administrative law judges. So it's my professional opinion that the Tribe does have the power to tax; that under current law, it's just that there's no case that clearly decides that at this point.

MR. TAYLOR: 18 USC 1151. It's actually a criminal jurisdiction statute, but the Supreme Court, in the Chickasaw Nation case, when it was talking about Tribal power to tax, and State taxation, said that they used that definition of Indian Country in the taxation area. Those of us who work in this area start from the proposition that that definition in section 1151 is the one we will use for Tribal taxation purposes.

By the way, it also specifically says that Indian Country includes rights-of-way, and by the Tribe, which is very important in this area. You would point to immediately, under 1151, if a taxpayer could come

back, that's not fee land at all. they could say, well, you gave me an easement. You gave up all your jurisdictional right when you gave me that easement. You don't have the right to tax me.

The answer would be no. We have the right to tax unless Congress takes it away or unless we give it up, and we did not give it up in the easement. The BIA didn't give it up, and Congress didn't give it up. Therefore, our aboriginal power, our power from time immemorial, still exists, and we can tax you if we choose. Our Tribal council enacted a law saying you owe and pay the tax now pay the tax.

Just like any other occupant of any other government. The price we pay for presence somewhere, like the New Mexico gross receipts tax.

MS. YAWAKIE: Is the Fort Berthold tax case relevant to this discussion?

MR. TAYLOR: Well, there is a reported case in the Eighth Circuit called Duncan Energy related to a tax on petroleum production. In that particular case, the taxpayer asserted that the Tribe did not have the power to tax. The Court really summarily dismissed most of the arguments, and said, yes, that the Tribe does have the power to tax. But moreover, you haven't gone through the Tribal system, Mr. Taxpayer, Duncan Energy Company, and you have to go back through the Tribal system before we were even going to listen to you.

The case got sent back to the Tribal system, the Tribal tax system. But the court was saying just in case you want to come back here, you should realize that we think the Tribe has the power to tax in circumstances like that. That was a petroleum production case.

I do know that Fort Berthold does have a possessory interest tax. They are in the process of imposing it and administering it. Those cases are pending in the Tribal tax system now.

It operates the same in New Mexico. If you don't want to pay the New Mexico gross receipts tax, you'd have to take it up with the State of New Mexico. They're not going to let you run to Federal court. They're not going to let you do any of that. You have to hash it out with the tax collector here.

I point that out because a lot of taxpayers will argue with Tribes and say, hey, you're a Tribe. have the power to tax. And the answer is yes, we do. And you can parade out the Supreme Court cases, which say the Tribe has the power to tax.

Some taxpayers will say it's not fair to impose a tax. We can't vote in Tribal elections. And I think the response to that is, most taxpayers can't vote. Companies can't vote. Foreigners can't vote in the United States. But if they're here and they make money, they got to pay the Federal income tax.

If I go to South Dakota and there's a sales tax there, I got to pay that. This no taxation without representation is really very much a red herring. It's just worn out junk from Revolutionary patriotism that has nothing to do with reality today, because taxpayers pay tax all the time, and they have no right to vote.

Taxpayers need to grow up and realize that they're dealing with governments, and that when governments impose taxes, you got to pay the taxes. It's a simple fact of life.

MR. COSSON: By the way, there's a telephone case, also, in Fort Berthold following that Duncan case.

MR. TAYLOR: Do you know the name of that? -- Reservation Telephone.

MR. ANTONE: One closing comment, when you get home check if the telephone provider in your community does have a certificate to lease and a certificate of necessity and convenience. More than likely they don't. And if they don't, then you have every power to do whatever you want.

MS. YAWAKIE: Thank you very much, to all of these experts in their areas. We appreciate your participation, and all of you for your wonderful information. Thank you, Scott, JD, Greg, David and Cecil. And thank you very much.

MS. YAWAKIE: Someone asked about why there are no names on the agenda for the business planning session. We brought together three Native American engineers, because it started to wear on me was when people would say, well, there are no Indian engineers. And I thought well, I can show you some. Our presenters are:

- **Pat Needham** and Ojibwe from Red Lake in Minnesota. He's Ojibwe. Pat lives in Denver and works for a major telecommunication firm there.
- **Melvin Yawakie** resides in Minnesota, is from the Zuni Pueblo, and works for a major telecommunication firm there.
- **Gary Beaver** is from San Carlos. He's Apache, and he works with a major telecommunication firm, also in Denver.

Today we're going to talk about business considerations and Tribal telephone utility development, and we put together a case study. It's an actual Tribe that a couple of people have worked with, to develop a telephone utility.

When you work in the industry, you tend to use many letters that begin to sound like alphabet soup. If you have any questions, please ask.

I thought it was important to identify the situation in Indian Country, and I want to keep reiterating is that right now, the number of homes with telephones in Indian Country is about 40 percent. Yesterday RUS said that some of those Tribal statistics are less. In some cases, 25 percent.

When we talk about telephone communications, it's easy to get excited about all the telemedicine applications, business opportunities using data lines, or data lines for transmitting data and getting big contracts. Also discussed is distance learning for our schools and libraries, and Internet access.

None of that can happen because we lack adequate and enhanced communication lines on the reservations. This means we need to build-up our infrastructure. As Indian people living in those communities, we need to come together and provide solutions and not just complain about service levels.

The solution is within our own Tribes. The need is to improve services, and I can't tell you what you need to do, because I promote telephone utility ownership for Tribes. I think it's economic development in one of the best forms. The other option, of course, is to work with your existing service provider. Sit down and start to negotiate what kind of arrangements you can make to improve services and build-out infrastructure in Indian Country.

We know that the communities that border our reservations have at least an 80 percent telephone penetration rate. In urban areas, it is about 95 percent. Of course, these have a variance, but these are the averages.

In your handout, there is a Tribal community assessment that shows the different entities that are involved in advancing and improving telecommunication services. Under each entities, there are different applications which are being encouraged by government programs the E rate program from the Schools and